SUPREME COURT, U. S.

APR 7 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1037

ELMER D. RUSSELL,
Petitioner,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ADDITIONAL PROCEEDINGS IN THE DISTRICT COURT

In addition to the opinion which is appended to the Petition (A14-A27), back on November 24, 1964 (App. 30) at the immediate conclusion of the trial the District Court also made these findings, *inter alia*:

"The Court: . . . . . From what I have heard here there is actually very little dispute as to the facts. The facts seem to be fairly well agreed on and I have, I went through my notes last night, and watched this morning to see whether there was anything received in evidence that would in any way affect the findings that I propose to make, and I think I'm prepared at this time to make the findings of fact.

I'm not prepared to make the conclusions of law or arrive at my judgment because I haven't read your briefs and I don't know just what law—what the result should be when the law is applied to the facts as I find them. I see no reason why I should not now announce my findings of fact and I will read your briefs and will, of course, give you an opportunity to point out wherein you feel, if either of you do, that I have found facts not supported by the evidence. . . . .

I find that there is no evidence that the—that the plaintiff or his wife asked for any particular type or plan of insurance.

Now, there was testimony, Rev. Russell stated, initially that he had asked for flight insurance, but on further examination stated, as I recall it, that he did not recall just what he had asked for and could not say that he had asked for flight insurance, and my finding in this respect is supported by the one I made earlier, that I do not believe that Rev. Russell had any real understanding of different types of insurance sold to air travelers. . . . .

I find that Miss Fletcher did state to the plaintiff and the plaintiff's wife, that the terms of the policy purchased by the plaintiff was four days from the time of issue. . . . .

Now, as I say, gentlemen, I don't know what the judgment should be. I don't know what the conclusions of law should be based on these findings. I make them now because now the matter is fresher in my mind

and now I have in mind the appearance of the witnesses as they testified and believe that I can make better findings at this time than I could if I waited for a transcript and read what you had to offer. As I say, by this I don't preclude either of you from pointing out what either of you feel—wherein either of you feel that I have made findings not supported by the evidence. To the extent that any of this is based on contradictory evidence, I think that I have considered and probably the matter is fresher in my mind now than it will be later, when you might attempt to persuade me to the contrary. . . .

Mr. Shamberg: Did Your Honor make a finding or would it be appropriate to request a finding on whether or not the agent ever told the plaintiff or his wife when the policy terminated?

The Court: Yes, I made a finding.

Mr. Eager: Four days.

The Court: Yes, four days." (App. pp. 166-170).

SUPPLEMENTAL STATEMENT OF FACTS

Unfortunately we find it necessary to supplement the petitioner's "Statement of Facts" (Pet. pp. 5-12). Both the T-18 and T-20 policy forms are approved by the Insurance Departments of Kansas, Missouri and elsewhere. Missouri's Insurance Department regulations were exclusively applicable at the Municipal Airport (App. 137). The two airport booths sold 1,291 of the T-18 forms and 1,171 T-20's from January 16, 1963 to January 31, 1963 (App. 136) These figures do not include any of the T-20 vending machine sales. There is no evidence that the commission rate was any higher on the T-18 than on the T-20 (App. 139).

On direct examination Rev. Russell testified that his family walked up to the north counter and, upon being asked

by sales clerk Miss Fletcher if she could help them, he replied, "Yes, we want flight insurance, insurance coverage on my wife who is going to Lubbock and return" (App. 64). However, later during cross-examination he admitted that he was "really not sure" that he had ever used the word "flight" but instead probably only said, "I want insurance covering a round trip to Lubbock for my wife" (App. 90). Mrs. Russell had no other accident insurance of any kind (App. 92).

Miss Fletcher next brought out an application pad and asked either how long Mrs. Russell would be gone, or when she would return to Kansas City, at which point the insured wife, turning toward her husband, remarked in a normal speaking voice, "Three days. Do you think we can make it back in three days?" (App. 66). Petitioner promptly cautioned her, "No, you better allow yourself more th... that", and suggested that she should instead plan on being gone for four days (App. 66, 83, 98); he "assumed" that the sales clerk understood this remark was made in answer to her previous question (App. 84). Russell is *uncertain* whether Miss Fletcher thereupon audibly counted off: "Friday, Saturday, Sunday and Monday" (App. 92).

Petitioner additionally conceded (App. 84):

> "Q. Of course, you can't remember everything that happened there, really, can you?
>
> A. No, we were emotionally disturbed.
>
> Q. And actually there may have been something else said that you don't recall, couldn't there?
>
> A. Could be possible."

Although Miss Fletcher does not specifically recall this incident (App. 141), she described her usual selling procedure as (App. 154):

> "First we ask them how many days they are going to be gone and after their answer we either count it out or mark it on the calendar and then we say we have the two policies, the flight, and this is our newer policy that gives you double coverage in the air and continued coverage on your trip, and then we have our rate card that we show them the rates and—have to recount the days and if it is—well, on this one, like four days . . ."

She says she always extends T-18 policy coverage on into the calendar day *following the day* upon which the customer plans to complete his trip, viz., since on Friday Mrs. Russell planned to return in four days or on Monday, a four day T-18 policy would insure her throughout all of Monday and on into Tuesday (App. 156). Miss Fletcher did not "make a mistake on this occasion" (App. 159).

Mrs. Edwards, respondent's airport manager, explained that Miss Fletcher was instructed to tell customers (App. 45-6):

> "A. We first ask them how many days was he going to be gone, and then he would tell us maybe three days, he was leaving today, which is Thursday, we would say Thursday, Friday, 'Will you be returning Saturday,' and he would say, 'Yes,' and we will tell the customer we have two policies, the flight and then this policy gives you double coverage to your flight and continuous coverage during your trip.
>
> Q. You then tell the customer you have two policies?
>
> A. We tell them we have two policies first.
>
> Q. What policies, do you then tell him what the policies are?
>
> A. We tell him we have two policies, the flight and this policy which gives you double flight coverage."

The customer is always given "a choice of the policy he wants" (App. 46, 48, 51). At his pre-trial deposition,

Rev. Russell could recall *no* difference between his earlier air trip policies and this one (App. 95-6) except for the amount.

Mrs. Russell always planned on returning to Kansas City as quickly as possible after the Lubbock, Texas, funeral (App. 123, 125). When she was first telephoned on Thursday, January 24, 1963, George Rainwater's funeral had not been scheduled because his son Bert, who was in the military service in England, had not yet been reached (App. 115, 122-3). Richard Russell finally telephoned Bert's commanding officer in England and learned that bad weather had unexpectedly grounded Bert's flight until Sunday (App. 108-9). On Monday the funeral was finally set up for 10:00 A.M. on Tuesday (App. 111, 112, 120-1). Bert didn't arrive in Texas until Tuesday morning, barely in time for the funeral (App. 121). Again on deposition, Rev. Russell admitted that the funeral had been "postponed" (App. 89). Except for this delay the funeral, according to undisputed custom, would have been held on Saturday or Monday (App. 84-5, 125).

Mr. McNabb received the amount of coverage for which he asked, "nothing was forced on me", and he doesn't know which type of policy he actually received (App. 132-3). There is no evidence that McNabb was at the sales counter with the Russells (cf. Pet. pg. 19). In fact he said (R. 384):

> "Q. Do you remember anybody else?
>
> A. There were people all around, but nobody talking to her that I recall.
>
> Q. Do you remember anyone else buying a policy at the same time or while you were there?
>
> A. Not while I was there, no."

ARGUMENT

The Decision Of The Court Of Appeals Is Not Contrary To Local Law, Was Rendered In The Usual Course Of Judicial Proceedings, And Concerns A Narrow And Unusual Aspect Of Insurance Law.

No federal question or state statute is involved. Petitioner tacitly concedes that this is an open question of local law.[1] The question decided is more fairly described by the Court of Appeals as (Pet. pg. A2):

> "In more austere terms the main issue presented for decision is whether the Assured is entitled to reformation of a general accident flight insurance policy purchased at Insurer's sales booth in the lobby of an airport. The District Court reformed the contract and awarded plaintiff $20,000. We hold that under the *unusual fact situation of this case* the insurance policy should not have been reformed and the decision of the District Court must be reversed." (Our emphasis).

And, contrary to the Petition at page 5, it is plain to us that the Circuit Court of Appeals did not reverse ". . . on the ground that the insurer had no duty to explain to the assured the significant differences in the types of coverage it offered for sale *regardless of the circumstances of the transaction.*" Indeed, we suggest that the Court of Appeals imposes a duty upon respondent but thereafter rules that said duty was not violated in this unique factual situation. The District Court kept this case under advisement from November 24, 1964 when the trial was concluded (App. 30) until April 6, 1966 (App. 27) when its memorandum order, findings of fact and conclusions of law were filed. This 16 1/2 month delay can hardly justify the statement

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1. Thus Circuit Judge Brown footnoted (Pet. pg. A9): "15. And neither party disagrees that this is a case of first impression." Similarly, District Judge Stanley commented (Pet. pg. A21): "No cases have been found, or cited, which are directly in point."

that the case gave ". . . no difficulty whatsoever" to the District Court as petitioner now suggests (Pet. pg. 15).

All concerned agree that the policy expired by its clear and unambiguous terms some 12 hours before Mrs. Russell's death and, therefore, the only meritorious issue is whether the T-18 policy should be reformed into a T-20 policy so as to extend coverage throughout the Lubbock to Kansas City return flight. Abundant Kansas case authorities hold that reformation may be granted only upon a clear, satisfactory and convincing standard of proof which far outweighs the usual preponderance, see *Skelton* v. *Federal Surety Co.*, 8 Cir. 1926, 15 F.2d 756, 757, *Columbian National Life Insurance Co.* v. *Black*, 10 Cir. 1929, 35 F.2d 571, 573, and *Shell Petroleum Corp.* v. *Corn*, 10 Cir. 1932, 54 F.2d 766, 769.

The Kansas Supreme Court has held, *Bodwell* v. *Heaton & Co.*, 40 Kan. 36, 39-40, 18 Pac. 901, 902-3:

> "We understand the rule to be in actions to reform written instruments on the ground of mutual mistake, that the evidence must be clear and convincing when, as in this case, it is *parol*. It is not enough that it shows a probability of mistake, but there must be a *moral certainty* of it; in other words, it must be established beyond a reasonable doubt. Of course this rule applies when the correction is sought to be made on the strength of parol testimony alone . . ." (Emphasis ours)

This rule of proof beyond a reasonable doubt is consistently followed in Kansas, *Kratz* v. *Padfield*, (1922), 111 Kan. 396, 397, 207 Pac. 776, 777; *Schaefer* v. *Mills*, (1904), 69 Kan. 25, 27, 76 Pac. 436; *Kansas Amusement Co.* v. *Maryland Casualty Co.*, (1928), 126 Kan. 354, 359, 267 Pac. 968, 970. "A high order of proof" is required to "convince or satisfy the mind of the trial court . . .", *Algeo* v. *Employers' Indemnity Corp.*, (1925), 119 Kan. 186, 189, 237

Pac. 879, 880. And the same exacting standard applies to cases of reformation for a unilateral mistake accompanied by inequitable conduct or fraud as well as to the more frequent mutual mistake situations, *Federal Land Bank of Wichita* v. *Bailey,* (1943), 156 Kan. 464, 469, 134 P.2d 409, 413; *Jones* v. *Crowell,* (1948), 164 Kan. 261, 264, 35 F.2d 573.

The real "mistake" here is not in the policy term but in the unexpected delay in holding George Rainwater's funeral. He died at 6:00 A.M. on Thursday (App. 113) and, under the admitted custom, his last rites should have been on Saturday or even Monday morning (App. 84-5, 125). Mrs. Russell was undoubtedly thinking of this when she first answered Miss Fletcher with, "Three days" (App. 66), and similarly the lack of any information from nephew Bert, or possibly the intervening Sunday (App. 85), thereupon prompted petitioner himself to warn her to add a fourth day. In all events, the issued T-18 policy effectively, correctly and candidly insured Mrs. Russell for 12 hours (i.e., from an assumed Kansas City Continental Airlines arrival at 10:45 P.M. on Monday, January 28 on up to policy expiry at 11:00 A.M. on Tuesday, January 29) past her *latest* expected return.

Miss Fletcher did not make any mistake (App. 159). She always understood that the T-18 policy supplied the requested Tuesday coverage in full accord with the intent of all concerned. Under such circumstances reformation to extend the insured term does not lie, *Kansas Amusement Co.* case, *supra,* 126 Kan. 358, 267 Pac. 970. The guide lines on reformation in Kansas are set out in *Waddle* v. *Bird,* 122 Kan. 716, 719, 253 Pac. 576, 577, as:

> "The remedy of reformation may be invoked to ascertain and enforce a contract actually made, but it

> can never be employed to make a new contract nor to supply terms upon which the minds of the parties never met."

Also consider *Bailey* v. *Talbert,* (1956), 179 Kan. 169, 176, 294 P.2d 220, 225-26.

This T-18 policy which insured Mrs. Russell for four days as she requested is indistinguishable from leasing agent Kirkbride's mistaken-but-intended lease in *Russell* v. *Shell Petroleum Corp.,* 10 Cir. 1933, 66 F.2d 864, where at l.c. 865-67:

> ". . . As far as Kirkbride was concerned, the lease contract evidenced exactly what he intended . . . . In other words, a mistake as to facts extrinsic to the oral negotiations and the contract led Kirkbride to make a contract which he would not have entered into had he understood the true facts, but the contract as written was exactly as he intended it to be; it expressed the very terms he intended.
>
> * * * *
>
> "To justify reformation on the ground of mistake, the mistake must have been made in the drawing of the instrument and not in the making of the contract which it evidences. . . . . A mistake as to the existing situation, which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."

This is the Kansas law! In the *Jones* case, *supra,* 164 Kan. 266, 188 P.2d 912, reformation was refused because the sellers were already aware that a clause about income taxes was omitted from the purchase contract when they executed it. On this the Kansas Supreme Court said:

> ". . . In that situation, since it contains everything the parties intended its provisions should include on the date of its execution, there is nothing about the contract to reform."

In order to reform, the inaccurately recorded "antecedent agreement" must first be established by the foregoing high standard of proof. *Shell Petroleum Corp.* case, *supra,* 54 F.2d 769, and *Columbian National Life Insurance Co.* case, *supra,* 35 F.2d 573. *C. S. Foreman Co.* v. *Great Lakes Pipe Line Co.,* 8 Cir. 1960, 274 F.2d 61, 65 reminds us:

> " 'The rule that must be applied in these cases is that the mistake to be corrected must have been made in drawing the instrument, and not in making the contract out of which it grew. . . .' "

Furthermore, we can appraise this situation only as it appeared to the parties at 11:00 A.M. on Friday, January 25, 1963. When we do so the Russells' erroneous belief that Mrs. Russell would return home no later than on Monday becomes a "mere mistake in prophecy, opinion or in belief relative to an uncertain event . . ." for which equity does not reform, *McMillin* v. *Farmers & Bankers Life Insurance Co.,* (1949), 167 Kan. 502, 507, 206 P.2d 1061, 1065; *Tucker* v. *Atchison, Topeka & Santa Fe Ry. Co.,* (1926), 120 Kan. 244, 247, 243 Pac. 269, 271; *Conway* v. *Conway,* (1931), 133 Kan. 148, 151, 298 Pac. 744, 746.

To obtain equity, petitioner "must stand upon some equity superior" to that of respondent, *Conaway* v. *Gore,* (1879), 21 Kan. 725. In this regard, the readily visible "Term of Coverage—4 Days" on the application must have: (1) actually disclosed Tuesday's expiry which was thereupon assented to by Mrs. Russell; or (2) raised an obvious red flag; or (3) been unimportant because the Russells had already been told about the termination on Tuesday by

Miss Fletcher; or (4) been ignored. In *any* one of these events no equitable relief should be granted in Kansas!

Reformation of an accident insurance policy was similarly refused in the *Algeo* case, *supra,* 119 Kan. 187, 237 Pac. 879, even though the policyholder, like the Russells, had not read his contract, instead relying on the agent's oral assurance that it was identical to an earlier policy. The Kansas Supreme Court thereupon observed, "There were marked differences in the policies, and some of these were plain, important and easily discerned." The failure to read an accessible contract can bar equity relief in Kansas, see *Cox* v. *Pabst Brewing Co.,* 10 Cir. 1942, 128 F.2d 468, 471. Still under Kansas law, in *Great Western Manufacturing Co.* v. *Adams,* 8 Cir. 1910, 176 F. 325, 327, we find:

> "Courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection."

The Court of Appeals must ascertain the substantive law for itself, *Burgess* v. *Montgomery Ward and Co., Inc.,* 10 Cir. 1959, 264 F.2d 495, 497. FRCP 52(a) does not require it ". . . to give any specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found", *Campana Corp.* v. *Harrison,* 7 Cir. 1940, 114 F.2d 400, 406; *Himmel Bros. Co.* v. *Serrick Corp.,* 7 Cir. 1941, 122 F.2d 740, 742; 5 Moore's *Federal Practice,* Sec. 52.03[2], pp. 2630-1. That this result is not incompatible with Kansas law, consider *Goforth* v. *Franklin Life Insurance Co.,* (1969), 202 Kan. 413, 449 P.2d 477, in which recent case policy reformation was also refused after the risk was held to be excluded from insurance coverage.

As seen, this petitioner seeks certiorari ". . . merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 US 175, 178, 82 L. ed. 1273, 1275, 58 S. Ct. 849 (1938). This consideration becomes even more persuasive against certiorari in a non-jury case. *Crumady* v. *Joachim Hendrik Fisser*, 358 US 423, 429, 3 L. ed. 2d 413, 418, 79 S. Ct. 445 (1959). We have a private dispute which breeds no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 US 498, 502, 95 L. ed. 479, 482, 71 S. Ct. 453 (1951). The latter case further reminds us, 340 US 503, 95 L. ed. 482-3:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

The ancient remedy of equity reformation is mainly of academic, intellectual or episodic interest, *Rice* v. *Sioux City Memorial Park Cemetery*, 349 US 70, 74, 99 L. ed. 897, 901, 75 S. Ct. 614 (1955), particularly under these non-recurring circumstances, viz., Mrs. Russell's initial and corrected replies to Miss Fletcher's question, Mrs. Russell slowly signing her name on the application in plain juxtaposition to "Term of Coverage-4 Days", and the unexpected delay of the Rainwater funeral because of bad flying weather in England, all as framed in an equity suit for reformation of a plainly worded policy. *Carter* v. *Atlanta & S.A.B.R. Co.*, 338 US 430, 438-9, 94 L. ed. 236, 243, 70 S. Ct. 226 (1949).

CONCLUSION

The Court of Appeals having painstakingly construed, determined and logically applied local law to unique facts in a manner which does not conflict with any decisions in Kansas or elsewhere, and none of the other policy considerations described in Supreme Court Rule 19 here existing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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